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Nos. 88-1671 and 88-1688

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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United States Department of Labor,
Petitioner,

v.

George R. Triplett, et al.,
Respondents.

No. 88-1688

Committee on Legal Ethics of the
West Virginia State Bar,
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v.

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Respondent.

On Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE
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VIRGINIA TRIAL LAWYERS ASSOCIATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ATTORNEY FEE PROVISIONS OF THE BLACK LUNG BENEFITS ACT, AS APPLIED TO PROHIBIT CONTINGENT FEES,DEPRIVE BLACK LUNG VICTIMS OF COUNSEL 4

A. BLACK LUNG CLAIMANTS ARE SERIOUSLY RESTRICTED IN OBTAINING REPRESENTATION BY COUNSEL 4

B. CONTINGENT FEE AGREEMENTS ARE THE ONLY REASONABLE MEANS OF ASSURING THE AVAILABILITY OF LEGAL REPRESENTATION FOR VICTIMS OF BLACK LUNG DISEASE 7

II. THE DEPRIVATION OF COUNSEL UNDER THE ATTORNEY FEE PROVISIONS OF THE ACT VIOLATES DUE PROCESS 8

A. BLACK LUNG CLAIMANTS ARE OPPOSED BY COUNSEL 9

B. BLACK LUNG PROCEEDINGS ARE ADVERSARIAL 10

C. BLACK LUNG CLAIMS POSE SIGNIFICANT QUESTIONS OF LAW, FACT AND PROCEDURE 10

D. BLACK LUNG VICTIMS DO NOT RECEIVE CLAIMS ASSISTANCE APART FROM REPRESENTATION BY COUNSEL ... 11

E. THE PROPERTY INTEREST AT STAKE IN BLACK LUNG PROCEEDINGS IS OF GREAT SIGNIFICANCE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases — Page

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (W. Va. 1988) ..... passim

Goldberg v. Kelly, 397 U.S. 254 (1970) 13

Lassiter v. Department of Social Serv., 452 U.S. 18 (1981) 12

Mathews v. Eldridge, 424 U.S.319 (1976) 9, 13

Pennsylvania v. Delaware Valley Citizens Council, 483 U.S. 711 (1987) 7

Pittston Coal Group v. Sebben, 109 S.Ct. 414 (1988) 4

Powell v. Alabama, 287 U.S. 45 (1932) 10

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 8,9,10,11,12,13

Constitution, Statutes and Regulations

U.S. Const., Amend. V 5, 13

Black Lung Benefits Act, 30 U.S.C. 901 et seq. .. 4,5

Federal Tort Claims Act, 28 U.S.C. 2687 8

42 U.S.C. 406(b)(1) 8

20 C.F.R.§ 725.365 5

20 C.F.R. §725.366 5

Other Authorities

127 Cong. Rec. 31,978 (1981) 13

Corboy, *Contingency Fees The Individual's Key to the Courthouse Door,* 3 Litigation 27 (Summer 1976) 5

Prunty and Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues,* 91 W. Va. L. Rev. 665 (1988-89) 6, 10

Selinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates,* 13 J. Legal Profession 123 (1988) 12

Pursuant to Rule 36.2 of this Court, and with the written consent of the parties filed with the clerk of this Court, the Association of Trial Lawyers of America and the Virginia Trial Lawyers Association submit this brief as amicus curiae in support of Respondent George R. Triplett.

INTEREST OF AMICUS

The Association of Trial Lawyers of America [ATLA] is a national voluntary bar association of over 60,000 trial attorneys across the nation. ATLA members primarily represent the victims of tortious misconduct and discrimination, as well as those accused of crimes. ATLA dedicates its efforts to protecting the rights of injured victims and to promoting the availability of qualified legal counsel to secure those rights. It is ATLA's firm conviction that a system which purports to extend benefits to those who have become disabled in doing this country's work, while denying the means to obtain legal assistance to obtain those benefits, truly deprives them of due process.

The Virginia Trial Lawyers Association [VTLA] is a professional association of more than 2,000 members. Founded in 1960, VTLA is dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, and protecting and preserving the liberties, rights, and benefits of an efficient and constitutionally sound judicial system. VTLA members have participated in black lung claims and are vitally interested in the issues presented in this appeal.

SUMMARY OF ARGUMENT

The contingent fee agreement has been called the "key to the courthouse" for the injured and indigent.

Department of Labor regulations prohibit this means of assuring that legal representation will be available to claimants under the Black Lung Act. Instead, the Department has promulgated fee regulations which, as applied, discourage attorneys from representing claimants under the Act. The Supreme Court of Appeals of West Virginia, based upon substantial evidence, found that delayed payments, low payments, and nonpayment of attorney fees have made it difficult for black lung victims to obtain counsel. These findings are worthy of great deference. They find strong support in the record of this case and are not significantly refuted by the figures presented by the Department.

Contingent fee agreements are a reasonable means of assuring that legal representation will be available to claimants, and should not be prohibited. The high rate of denials in black lung cases makes it virtually impossible to set hourly rates that would spread the cost of unsuccessful actions among all claims. Contingency agreements, however, are ideally fashioned for such circumstances. While Congress is legitimately concerned with protecting victims against depletion of benefits, this can be accomplished here, as it has in other areas, by placing limits on the percentage of contingency fees.

The deprivation of counsel found by the West Virginia Supreme Court of Appeals amounts to a violation of the claimants right to Due Process. While this Court has upheld very stringent limits on attorney fees in veterans benefits proceedings, that decision rested on a set of distinctive circumstances that ameliorated the effect of lack of counsel. Compared with veterans, black lung claimants encounter a far more adversarial system, including opposing counsel, governed by complex legal, factual, and procedural requirements. Moreover, black lung benefits are of crucial importance to those who are entitled, who are

totally and permanently disabled. Regulations which have the practical effect of depriving claimants of counsel under these circumstances clearly violate fundamental fairness.

ARGUMENT

I. THE ATTORNEY FEE PROVISIONS OF THE BLACK LUNG BENEFITS ACT, AS APPLIED TO PROHIBIT CONTINGENT FEES, DEPRIVE BLACK LUNG VICTIMS OF COUNSEL.

A. BLACK LUNG CLAIMANTS ARE SERIOUSLY RESTRICTED IN OBTAINING REPRESENTATION BY COUNSEL.

The issue before this Court, though it comes dressed in the prosaic garb of administrative regulation, is one of fundamental fairness. Our commitment to this constitutional principle is measured by society's treatment of its most vulnerable and powerless members. This case has its origins in human tragedy, eloquently described by Justice Neely for the court below: "A high price is demanded of those who extract the life's blood of West Virginia's economy from the arteries of her mountains. As his lungs become clogged with insidious and pervasive dust, the miner . . . feels himself increasingly weakened and helpless, unable to provide even the most modest means of support for his family." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82 (W. Va. 1988).

Congress enacted the Black Lung Benefits Act, 30 U.S.C. 901 et seq. to provide benefits "to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment." *Pittston Coal Group v. Sebben,* 109 S.Ct. 414, 417 (1988). The Act provides for compensation to

those who represent claimants only upon approval of the adjudicating authority. 30 U.S.C. §932.

The contingency fee agreement, widely used in private personal injury suits and in certain actions against the government, has deservedly been called the "key to the courthouse" for injured victims who could not otherwise afford to retain counsel. *See, e.g.* Corboy, *Contingency Fees The Individual's Key to the Courthouse Door*, 3 Litigation 27 (Summer 1976). At issue in this case are the Department of Labor [hereinafter "DOL"] regulations under the Act which prohibit contingency fee agreements, 20 C.F.R.§ 725.365, and limit attorneys to fees approved by the adjudicating authority which "shall be reasonably commensurate with the necessary work done." 20 C.F.R. §725.366.

The court below took care to state that the statute and regulations at issue are not unconstitutional on their face. 378 S.E.2d at 89. In actual practice, however, the regulatory scheme has proved to be a poor substitute for the contingency fee agreement in assuring the availability of counsel for claimants. Attorneys have encountered severe problems of low payments, delayed payments, and even nonpayment of fees. *Id.* at 89-91. The conclusion of the West Virginia court is disturbing, yet compelling:

> [W]e find that the DOL system of awarding attorney's fees does, in fact, severely restrict claimants' ability to find competent lawyers to represent them, and therefore, the system violates due process . . . *Id.* at 93.

This conclusion by the highest court of West Virginia is based on specific factual findings that are worthy of great deference. The court carefully considered evidence adduced at a hearing on the practical effect of the

DOL fee provisions, briefs of interested parties, numerous attorney affidavits, and congressional testimony. 378 S.E.2d at 85 & 89.

DOL's denigration of this evidence as "anecdotal," Brief for the Federal Petitioner at 14 [hereinafter "DOL Brief"] hardly establishes that the court's findings were clearly erroneous or without substantial support. While affidavits of five attorneys might appear to be a limited showing, there is evidence that only "approximately one dozen" attorneys in all of West Virginia regularly undertake a significant number of black lung cases. Affidavit of Grant Crandall, in Brief in Opposition to Pet. at A-30. Amicus also believes that further investigation will reveal that claimants in other states face similar hardships in obtaining legal counsel. Moreover, the court granted a rehearing at which the DOL presented its own statistical evidence. The court specifically addressed the DOL figures, and then reaffirmed is finding that serious barriers to obtaining legal assistance exist for black lung claimants. 378 S.E.2d at 96-98. Informed commentators agree that the unavailability of attorneys is a "very real and widespread problem." Prunty and Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues,* 91 W. Va. L. Rev. 665, 727 (1988-89). DOL itself concedes that "some attorneys have found it not worthwhile to represent black lung claimants." DOL Brief at 18.

DOL's defense of its fee provisions relies heavily on it own statistic that 92% of claimants before an ALJ were represented. DOL Brief at 14. The court below took the DOL figures into account in making its determination. 378 S.E.2d t 98. Additionally, the DOL statistic is rendered suspect by the manner in which claimant list counsel, as pointed out in the brief of the United Mine Workers as amicus curiae. DOL itself concedes that it does not generally prepare statistics on the rate of representation in

black lung cases and indicates that a forthcoming report by the General Accounting Office will provide more detailed information. DOL Brief at 30 n.13.

Amicus submits that the West Virginia Supreme Court of Appeals' factual finding, that the DOL fee provisions as applied deprive black lung claimants of counsel, is supported by substantial evidence.

B. CONTINGENT FEE AGREEMENTS ARE THE ONLY REASONABLE MEANS OF ASSURING THE AVAILABILITY OF LEGAL REPRESENTATION FOR VICTIMS OF BLACK LUNG DISEASE.

The inescapable fact is that Black Lung Act claims involve a high risk of failure and long delays in processing. DOL does not dispute these determinations. These conditions, the West Virginia Court found, as they affect fees, are the primary reasons that attorneys are reluctant to represent victims. 378 S.E.2d at 91. The contingent fee agreement is a reasonable means by which lawyers and claimants may overcome this problem and should not be prohibited.

DOL's response, that Mr. Triplett and other attorneys could accommodate the risks and delays inherent in the system by raising their hourly rates, is no solution. In view of the 95% failure rate for claims, a fee multiplier that would account for the risk of nonsuccess would be prohibitive. Suggesting such an alternative hardly coincides with the DOL's stated concern with protecting the Trust Fund. Moreover, it is not clear at all that this Court is prepared to approve an across-the-board multiplier, let alone one of such magnitude. *See Pennsylvania v. Delaware Valley Citizens Council,* 483 U.S. 711 (1987).

Amicus suggests that a more suitable means of assuring that qualified counsel will be available to claimants already exists in the form of contingent fee agreements. DOL maintains that Congress' intent was to protect insured claimants from "improvident agreements that needlessly deplete their benefits." DOL Brief at 22. DOL cites no authority to support this divination of legislative intent, though it is certain that Congress did not intend the situation found by the West Virginia court. "Unfortunately, the result of these regulations has been to make lawyers almost entirely unavailable to claimants. 378 S.E.2d at 91-92.

The decisions that DOL does cite stand only for the proposition that Congress has a legitimate interest in preventing lawyers from *overcharging* their clients. Amicus points out that Congress has approved contingency fees with adequate safeguards to protect claimant-clients in similar circumstances. Claims under Federal Tort Claims Act, 28 U.S.C. 2687, for example, may be pursued on a contingency fee basis, with a limit of 25%. Likewise, claimants for Social Security benefits may obtain counsel under a contingency fee, which must not exceed 25% 42 U.S.C. 406(b)(1). Significantly, in the cases involved here, Mr. Triplet's agreement with each of his six clients provided for a 25% fee, the precise amount that Congress has approved for other claimants.

II. THE DEPRIVATION OF COUNSEL UNDER THE ATTORNEY FEE PROVISIONS OF THE ACT VIOLATES DUE PROCESS.

This Court recently indicated that deprivation of counsel in civil cases does not, of itself, violate due process. *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985). That decision, however, does not

determine the outcome of the due process challenge in this case. Indeed, the *Walters* Court cautioned that due process "is a flexible concept," which "will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation occurs." *Id.* at 321. In applying the test set out in *Mathews v. Eldridge,* 424 U.S.319, 335 (1976) the Court indicated that the VA benefits procedure presented several distinctive features which ameliorated the effect of the inability to obtain counsel. Foremost was the uncomplicated, nonadversarial nature of the system devised by Congress to process veterans' claims. The circumstances faced by a black lung claimant are far different and demonstrate that depriving such claimants of counsel constitutes a significant due process violation.

A. BLACK LUNG CLAIMANTS ARE OPPOSED BY COUNSEL.

The most significant distinction between a VA proceeding and a proceeding under the Black Lung Act is also the most obvious: the presence of opposing counsel. This Court explained in *Walters*

> While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty is to aid the claimant, and significant concessions with respect to claimants burden of proof, the need for counsel is considerably diminished. 473 U.S. 333-34.

Mine operators, it should not be overlooked, are not limited in the amounts that they can spend in retaining top-

flight legal talent to fight claims by disabled miners. Common sense would appear to dictate that if one party in a controversy recognizes the need for legal counsel, it is likely that the opponent also needs an attorney. DOL itself notes that "Congress could reasonably conclude that black lung claimants -- consisting primarily of elderly coal miners and their survivors -- are susceptible to exploitation and require protection against depletion of their benefits." DOL Brief at 24. Amicus respectfully submits that representation by an attorney whose interest under a contingency fee agreement is to preserve those benefits, advances Congress' objective. A system which has the practical effect of sending such vulnerable persons unarmed and unaided into the lion's den hardly comports with Congress' solicitude.

B. BLACK LUNG PROCEEDINGS ARE ADVERSARIAL

In an exercise in understatement, DOL concedes that "the black lung program is not intended to function as informally as the VA benefits system at issue in *Walters*." DOL Brief, at 35. The fact of the matter is, as the West Virginia court pointed out, proceedings under the Black Lung Act are "viciously adversarial." 378 S.E.2d at 92.

C. BLACK LUNG CLAIMS POSE SIGNIFICANT QUESTIONS OF LAW, FACT AND PROCEDURE.

"The right to be heard would be, in many cases, of little avail," Justice Southerland remarked in *Powell v. Alabama,* "if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. 45, 69 (1932). Congress' well-intended program stands as a citadel of near Byzantine complexity. *See generally,* Prunty and Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues,* 91 W. Va. L. Rev. 665 (1988-89).The onion-like layers of eligibility provisions, the

factual difficulty in tracing the responsible mine operator, the difficult medical questions of causation associated with pneumoconiosis, are but a few of the daunting legal, factual, and procedural hurdles that Black lung claimants face. As Justice Neely states, "a claimant who appears without a lawyer is in for a baffling and frustrating experience." 378 S.E.2d at 88. Even DOL's statistics establish that represented claimants succeed 2.5 times oftener than pro se claimants. *Id.* at 98.

D. BLACK LUNG VICTIMS DO NOT RECEIVE CLAIMS ASSISTANCE APART FROM REPRESENTATION BY COUNSEL.

The *Walters* court attached great importance to the fact that VA claimants, though unable to obtain an attorney, frequently received assistance from knowledgeable representatives provided by veterans service organizations. No similar alternative representation exists for black lung claimants. 378 S.E.2d at 92.

More importantly, the procedure in *Walters* provided "a decisionmaker whose duty is to aid the claimant." 473 U.S. 334. DOL asserts that it, too, provides assistance to unrepresented claimants. DOL Brief at 35-38. Most of the services enumerated by DOL, however, amount to no more than instructing claimants in properly filling out forms, explaining the reasons for denial of claims, and waiving the requirement of a brief to the Review Board. While helpful, such aids do not address the complex legal and factual complexities of claims. Ironically, one form of assistance to pro se claimants that DOL lists is providing the names and addresses of attorneys who represent black lung claimants. DOL Brief at 37

A process that may appear hospitable to claimants may nevertheless be hostile in practice, as subsequent

developments in the *Walters* case attests.

> Further, subsequent proceedings in *Radiation Survivors* in which the district court (following a suggestion in Justice O'Connor's concurring opinion) certified radiation claimants as a special class who could allege an entitlement to counsel because their claims are complex, [*National Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986)] have unveilled a picture of the VA's administrative process far different from the one painted by Justice Rhenquist. The District Court has heard evidence of a VA reward system that based merit pay and promotions for adjudicators on simply closing cases, sometimes without even requesting basic documentation; the VA has been fined by the court for willfully destroying evidence sought by the plaintiffs; and a prominent private attorney has been appointed Special Master to oversee the agency's compliance with future discovery orders. The House and Senate Veterans Affairs Committees are also investigating VA mismanagement in handling disability claims. Selinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates,* 13 J. Legal Profession 123, 129-130 (1988).

E. THE PROPERTY INTEREST AT STAKE IN BLACK LUNG PROCEEDINGS IS OF GREAT SIGNIFICANCE.

Yet another factor in determining whether a deprivation of counsel amounts to a deprivation of due process is the magnitude of the private interest at stake in the particular proceeding. *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 31-32 (1981). This Court has found that the termination of welfare benefits involves a weighty

private interest, since the benefits represent "the very means by which to live." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). The *Walters* court determined that the benefits at stake in a VA proceeding "are more akin to the Social Security benefits involved in *Mathews* than they are to the welfare payments upon which the recipients in *Goldberg* depended for their daily subsistance." *Walters*, 473 U.S. at 334.

Amicus submits that the Black Lung benefits, from the perspective of the claimant's interest, is clearly akin to those in *Goldberg*. The legislative history indicates that congress enacted the 1981 amendments to restore the program "as a disability program, and no longer a pension program." 127 Cong. Rec. 31,978, quoted in DOL brief at 18. There is no better indication of the crucial importance of these benefits to claimants than that advanced by DOL itself. DOL argues with considerable vigor that Congress viewed the benefits as so important to recipients that none should be diverted to attorneys. Brief of DOL, at 24-25. In view of that contention, DOL cannot credibly assert that the interest of claimants in such benefits is not significant. DOL Brief at 44.

Amicus submits that the balance of interests which determine the meaning of "due process" in a particular procedural environment clearly supports the conclusion of the highest court of West Virginia, that the DOL regulations relating to compensating attorneys for representing claimant under the Black Lung Act are violative of the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to affirm the judgment and order of the Supreme Court of Appeals of West Virginia.

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